HASSAN KADIR & ORS A

v.

MOHAMED MOIDU MOHAMED & ANOR

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: J-02-729-2002]
6 JANUARY 2010 C

LAND LAW: *Indefeasibility of title and interests - Determination of title - Constructive trusts - Endorsement on register document of title - Validity of deed of sale and irrevocable power of attorney - Effect of s. 205(3), (4), (5) National Land Code - Whether s. 205(5) prevailed - Whether deed not rendered invalid by s. 205(3)* D

This was an appeal by the defendants against the High Court's decision allowing the plaintiffs' claim in part and ordering that: (i) the defendants do hold certain land subject to the constructive trusts created in favour of the plaintiffs to the extent of 21,000 square feet thereof pursuant to the execution of a Deed of Sale and Irrevocable Power of Attorney dated 7 October 1978 ('Deed'); and (ii) pursuant to s. 417 National Land Code ('NLC') the Registrar of Titles or the Land Administrator do cause an endorsement to be entered on the register document of title of the trusts aforesaid in favour of the defendants herein. The defendants' primary ground of appeal was that the High Court had erred in relying on equity and in directing the Land Administrator to endorse the plaintiffs' interest, notwithstanding s. 205(3) NLC prohibits co-proprietorship of agricultural land of less than two-fifths of a hectare. The plaintiffs, however, contended that the Deed had been validly executed on 7 October 1978, before s. 205(3), (4) and (5) NLC came into force. Thus, the question for consideration was whether s. 205(3) NLC, read together with s. 205(4) and (5), prohibited the High Court from making the above orders. E F G H

Held (dismissing the appeal with costs)
Per Low Hop Bing JCA delivering the judgment of the court: I

(1) The amendment in s. 205(3) NLC was inserted *vide* s. 77 Act A587/1984 to prohibit the holding of agricultural land by co-owners where the area of the individual portions is less than

two-fifths of a hectare. However, s. 205(3) is to be read subject to subs. (4) and (5). The amendment in s. 205(5) NLC was effected by s. 24 Act A615/1985 which came into force on 1 June 1985. Since the Deed was executed on 7 October 1978, some six to seven years before the enactment s. 205(3) as modified by s. 205(5), it was thus axiomatic that s. 205(3) was inapplicable. Instead, s. 205(5) prevailed and the Deed was not rendered invalid by s. 205(3). The effect of introducing s. 205(5) is to preclude the retrospective effect of s. 205(3) on certain instruments. The orders made by the High Court were, therefore, well within the ambit of the NLC. *Tan Ean Leng & Anor v. Pentadbir Tanah Daerah Kuala Muda Sungai Patani* (foll). (paras 16-18)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan defendan-defendan terhadap keputusan Mahkamah Tinggi membenarkan tuntutan plaintif-plaintif dan mengarahkan bahawa: (i) defendan-defendan memegang tanah tertentu tertakluk kepada amanah-amanah konstruktif yang diwujudkan atas nama plaintif-plaintif setakat 21,000 kaki persegi menurut pelaksanaan Surat Ikatan Jual dan Surat Kuasa Wakil yang tidak dapat dibatalkan ('Surat Ikatan'); dan (ii) mengikut s. 417 Kanun Tanah Negara ('KTN') Pendaftar Hakimilik atau Pentadbir Tanah mengakibatkan suatu endorsmen dicatatkan pada dokumen pendaftaran hakmilik amanah-amanah yang dikatakan dalam pihak defendan-defendan. Alasan rayuan utama defendan-defendan adalah bahawa Mahkamah Tinggi telah khilaf bila bergantung pada ekuiti dan dalam mengarahkan Pentadbir Tanah mengendors kepentingan plaintif-plaintif, meskipun s. 205(3) KTN menghalang milikan bersama tanah pertanian yang kurang dari dua-perlima sehektar. Plaintif-plaintif, walau bagaimanapun, menghujah bahawa Surat Ikatan telah dilaksanakan dengan sah pada 7 Oktober 1978, sebelum s. 205(3), (4) dan (5) KTN dikuatkuasakan. Oleh yang demikian, soalan yang perlu ditimbangkan adalah sama ada s. 205(3) KTN, dibaca bersama dengan s. 205(4) dan (5), menghalang Mahkamah Tinggi dari membuat arahan di atas.

Diputuskan (menolak rayuan dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Pindaan dalam s. 205(3) KTN telah dimasukkan melalui s. 77 Akta A587/1984 untuk menghalang pemegangan tanah pertanian oleh pemilik bersama di mana kawasan bahagian-bahagian individu adalah kurang dari dua-perlima sehektar. Walaupun begitu, s. 205(3) seharusnya dibaca tertakluk kepada subs. (4) dan (5). Pindaan dalam s. 205(5) KTN telah dilaksanakan oleh s. 24 Akta A615/1985 yang mula dikuatkuasakan pada 1 Jun 1985. Oleh kerana Surat Ikatan telah dilaksanakan pada 7 Oktober 1978, kira-kira enam hingga tujuh tahun sebelum enakmen s. 205(3) seperti diubahsuai oleh s. 205(5), ia adalah tidak dapat disangkal bahawa s. 205(3) tidak boleh dipakai. Sebaliknya, s. 205(5) mengatasinya dan Surat Ikatan tidak dijadikan tak sah oleh s. 205(3). Kesan memperkenalkan s. 205(5) adalah untuk menghalang kesan retrospektif s. 205(3) ke atas suratcara tertentu. Perintah-perintah yang dibuat oleh Mahkamah Tinggi, oleh itu, nyata termasuk dalam lingkungan KTN. *Tan Ean Leng & Anor v. Pentadbir Tanah Daerah Kuala Muda Sungai Patani* (diikuti).

Case(s) referred to:
Tan Ean Leng & Anor v. Pentadbir Tanah Daerah, Kuala Muda, Sungai Patani [1989] 1 CLJ 812; [1989] 2 CLJ (Rep) 550 HC ***(foll)***
Verama Muthusamy v. Arumugam Muthusamy & Anor [1981] CLJ 180; [1981] CLJ (Rep) 296 HC ***(refd)***

Legislation referred to:
National Land Code, ss. 205(3), (4), (5), 417
National Land Code (Amendment) Act 1984 (A587/1984), s. 77
National Land Code (Amendment) Act 1985 (A615/1985), s. 24

Other source(s) referred to:
Judith Sihombing, *National Land Code – A Commentary,* 1992, p 379

For the appellant - Mathews George; M/s Mathews George & Co
For the respondent - Robert Lai (Fadzilah Mansor with him); M/s Jackson & Masacorale

[Appeal from High Court, Johor Bahru; Civil Suit No: 22-205-1996]

[Editor's note: For the High Court judgment, please see Mohamed Moidu Mohamed & Anor v. Hassan Kadir & Ors (No 2) [2001] 6 CLJ 533.]

Reported by Suresh Nathan

A

JUDGMENT

Low Hop Bing JCA:

Appeal

B **[1]** This is an appeal by the appellants (the defendants) against the decision of the learned judicial commissioner who had, after a full trial, allowed the respondents' (the plaintiffs') claim in part and ordered:

C (1) that the defendants do hold the land comprised in GM 482 (previously known as EMR 381) Lot 261, in the mukim of Plentong, district of Johor Bahru (the land) subject to the constructive trusts created in favour of the plaintiffs to the extent of 21,000 square feet thereof (the said portion)
D pursuant to the execution of the Deed of Sale and Irrevocable Power of Attorney (the Deed) dated 7 October 1978; and

(2) that pursuant to s. 417 of the National Land Code 1965, the Registrar of Titles or the Land Administrator, as the case may be, do cause an endorsement to be entered on the register
E document of title of the trusts aforesaid in favour of the defendants herein.

Factual Background

F **[2]** By the deed, the plaintiffs purchased the said portion in the land from the defendants' father.

[3] The plaintiffs had duly paid the full purchase price of RM42,000 and taken possession of the said portion. The existence of trusts in favour of the plaintiffs is not disputed.
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[4] The defendants' father passed away on 17 November 1978.

[5] The defendants then obtained a distribution order as beneficiaries of their late father's estate, wherein the land, including
H the said portion, was transmitted to the defendants as registered owners in equal shares.

[6] When the plaintiffs discovered this fact in 1986, they requested the defendants to transfer the said portion to them but
I the defendants refused.

[7] The plaintiffs then lodged a private caveat on the land. The plaintiffs' application to the Johor Bahru land administrator to vary the distribution order was rejected.

[8] Later the plaintiffs filed an originating summons against the defendants but withdrew it with liberty to file afresh.

[9] Subsequently, the plaintiffs filed a writ of summons against the defendants praying for, *inter alia*, a declaration that the plaintiffs are entitled to the said portion under the Deed and the defendants as trustees do transfer the same to the plaintiffs as registered co-owners thereof, failing which the Senior Assistant Registrar shall execute the transfer of the said portion to the plaintiffs and that the Registrar of Titles be directed to register the same in favour of the plaintiffs; and costs.

Co-proprietorship Under s. 205(3), (4) And (5)

[10] Defendants' primary ground of appeal presented by learned counsel Mr Mathews George is that the learned judicial commissioner has erred in relying on equity and in directing the land administrator to endorse the plaintiffs' interest notwithstanding s. 205(3) of the National Land Code 1965 which, according to him, prohibits co-proprietorship of agricultural land of less than two-fifths of a hectare. He cited *Verama Muthusamy v. Arumugam Muthusamy & Anor* [1981] CLJ 180; [1981] CLJ (Rep) 296 HC in support thereof.

[11] Plaintiffs' learned counsel, Mr Robert Lai (assisted by Ms Fadzilah Mansor) argued that the Deed has been validly executed on 7 October 1978, before s. 205(3), (4) and (5) came into force on 25 March 1985.

[12] The above submissions call for the determination of the following question:

> Does s. 205(3) of the National Land Code 1965, read with s. 205(4) and (5), prohibit the High Court from making the above orders?

[13] It is essential for us to refer to s. 205(3) which provides as follows:

> **205. Dealings capable of being effected, and persons capable of taking thereunder**
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> (3) Subject to sub-section (4), no dealing in respect of any alienated land subject to the category "agriculture" or to any condition requiring its use for any agricultural purpose shall be effected if such dealing would have the effect of creating any

A undivided share of such size that, if the land is to be partitioned in proportion to the several shares, the area of any resulting individual portion would be less than two-fifths of a hectare.

[14] Section 205(3) was expressly enacted subject to s. 205(4) which merits reproduction as follows:

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(4) The prohibition imposed by sub-section (3) shall not apply to those cases where upon the coming into force of the said sub-section, any alienated land held by any person or body, is less than two-fifths of a hectare, or an undivided share in any alienated land held by any person or body represents a portion of less than two-fifths of a hectare, and dealings shall be capable of being effected in respect of such alienated land or undivided share therein:

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Provided that:

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(i) any such dealing shall be in respect of the whole of the alienated land and shall be in favour of only one person or body; or

(ii) any such dealing shall be in respect of the whole of any undivided share in any alienated land and shall be in favour of only one person or body, or one or more co-proprietors of the said land.

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[15] It is noteworthy that s. 205(3) and (4) are in turn to be construed in the light of s. 205(5) in the following words:

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(5) *Nothing contained in sub-section (3) and (4) shall render invalid any instrument effecting any dealing in any alienated land or any undivided share therein executed under this part before the commencement of this section.* (emphasis added)

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[16] The amendment in s. 205(3) was inserted *vide* s. 77 of Act A587/1984 to prohibit the holding of agricultural land by co-owners where the area of the individual portions is less than two-fifths of a hectare: See *National Land Code – A Commentary* by Judith Sihombing p. 379 (1992). However, as alluded to above, s. 205(3) is to be read subject to sub-section (4) and (5). The amendment in s. 205(5) was effected by s. 24 of Act A615/1985 which came into force on 1 June 1985. The Deed in the instant appeal was executed on 7 October 1978, some six to seven years before the enactment s. 205(3) as modified by s. 205(5). It is therefore axiomatic that s. 205(3) is inapplicable. Instead, s. 205(5) prevails and the Deed is not rendered invalid by s. 205(3). The effect of introducing s. 205(5) is to preclude the retrospective

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effect of s. 205(3) on certain instruments. In the circumstances of this appeal, s. 205(5) prevails. Hence the Deed is not rendered invalid by s. 205(3).

[17] In *Tan Ean Leng & Anor v. Pentadbir Tanah Daerah, Kuala Muda, Sungai Patani* [1989] 1 CLJ 812; [1989] 2 CLJ (Rep) 550, Lim Beng Choon J (as he then was) upheld the purchase of land in 1979 and the execution of the transfer in 1980 although the presentation for registration was rejected by the land administrator who relied on the provisions of s. 205(3). The learned judge held that the transfer was executed before 25 March 1985 and so s. 205(3) could not invalidate it. Instead s. 205(5) applied and so nothing contained in s. 205(3) could have rendered the purchase and transfer invalid.

[18] In *Verama, supra,* cited for the defendants, Arulanandom J (as he then was) held that our land laws, which are governed by the National Land Code 1965, would not be tampered by equity. However, we note that in the instant appeal, there is no necessity for the learned judicial commissioner to apply any doctrine of equity, as the existence of trusts in favour of the plaintiffs had not been disputed. We found that the orders made by the court below was within the ambit of the National Land Code 1965. We therefore see no substance in the submission presented for the defendants.

Conclusion

[19] In view of the grounds given above, we held that the learned judicial commissioner was correct in making the said orders. We therefore dismissed the defendants' appeal with costs of RM3,000 and affirmed the said orders. Deposit to the plaintiffs on account of the fixed costs.